FILED
MAY 4 1926
WM. R. STANSBURY
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1925.

No. 11[redacted] 363

JOAN POSADOS, JR., AS COLLECTOR OF INTERNAL REVENUE, BEN F. WRIGHT, AS INSULAR AUDITOR, VICENTE CARMONA, AS INSULAR TREASURER, and the METROPOLITAN WATER DISTRICT, *Petitioners*,

vs.

THE CITY OF MANILA, *Respondent*.

Petition for a Writ of Certiorari to the Supreme Court of the Philippine Islands.

L. H. HEDRICK,
O. R. MCGUIRE,
Attorneys for Petitioner.

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

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vs.

THE CITY OF MANILA, *Respondent*.

Petition for a Writ of Certiorari to the Supreme Court of the Philippine Islands.

To The Honorable,
The Chief Justice and Associate Justices
of the Supreme Court of the United States:

Petitioners, Joan Posados, Jr., as Collector of Internal Revenue, Ben F. Wright, as Insular Auditor, Vicente Carmona, as Insular Treasurer, and the Metropolitan Water District, of the Philippine Islands, respectfully petition this Honorable Court for a writ of certiorari to review the judgment of the Supreme Court of the Philippine Islands in the case entitled The City of Manila, Petitioner (Respondent

here) vs. Joan Posados, Jr., as Collector of Internal Revenue, Ben F. Wright, as Insular Auditor, Vicente Carmona, as Insular Treasurer, and the Metropolitan Water District, Respondents (Petitioners here), No. 23551.

I.

THE CASE.

By Act No. 2832 (March 6, 1919) the Philippine Legislature created "a public corporation" known as the Metropolitan Water District (hereinafter referred to as Water District), and under the control, direction and general supervision of the Secretary of the Interior of the Philippine Islands. The area within which it operates includes the City of Manila and certain contiguous municipalities (Section 1). Its powers, functions, and activities, exercised by a board called the District Board, among other things, include the construction, maintenance and operation of a water system for the purpose of supplying water to the inhabitants of the District, both for domestic and other purposes, and the fixing and providing for the collection of charges therefor (Section 2). The Act authorizes and directs the District Board to receive and assume on behalf of the Water District all assets and liabilities pertaining to the water works system of the City of Manila (hereinafter referred to as City) (Section 8), and further provides that the Water District "shall own and control all the * * * water distributing systems of the City of Manila and all the municipalities comprising the District, and shall charge and collect a uniform rate for all services rendered, whether to any person, corporation, firm, governmental body, municipal entity, religious or charitable institution." (Section 9.)

Since the Water District commenced functioning under the foregoing authority in 1919, it has furnished water service to the City. For some of this water service the City has paid the Water District, but for certain of the water

service so furnished, including water for use in fighting fire, sprinkling streets, and in public fountains, the City refused and continues to refuse to pay, claiming it is entitled to such water service free of charge.

After repeated demand in vain for payment the Water District reported the matter to the then Insular Auditor, E. M. Fullington, who on January 9, 1922, under Section 588 of the Administrative Code of the Philippine Islands, which gave him the power "to authorize and enforce settlement of accounts subsisting between the different bureaus and offices of the Insular Service or between any such bureau or office and any provincial or municipal government," authorized the Collector of Internal Revenue (hereinafter referred to as the Collector) to draw warrants in favor of the Water District against the City's apportionment of internal revenue collections in the Insular Treasury, in settlement of part of the accounts of the Water District against the City. The warrants were drawn and were countersigned by the Auditor and the amounts thereof transferred to the credit of the Water District and charged against the allotment of the apportionment of the City.

The Water District continued to furnish water service to the City, the latter continued its refusal to pay as above indicated, and the present Insular Auditor (Petitioner) (hereinafter referred to as the Auditor) continued to "enforce the settlement" of the accounts subsisting between the Water District and the City in the manner above indicated until just prior to the commencement of this action. In the meantime the status of the City and the Water District under the Accounting Law had been definitely fixed by Act No. 3066 (1923) amending Section 593 of the Administrative Code, which provides that "the chartered cities (of which the City of Manila is one) and the Metropolitan Water District * * * shall be regarded as provinces." By the same Act (No. 3066), the powers of the Auditor defined in Section 588 of the Administrative Code, *supra*, were amplified so as to give him power "to authorize and enforce the

settlement of accounts subsisting * * * between provincial governments; between municipal or city governments; and between any such provincial and municipal or city governments."

On November 10, 1924, the City Fiscal wrote to the Collector protesting against applying any portion of the City's share of the proceeds of internal revenue collections in the Insular Treasury to the payment of bills for water service to the Water District, and requesting "that from now on you refrain from making further payments out of this fund belonging to the City of Manila," and that warrant for the quarter July to September, 1924, be issued in favor of the City. (R. 18-19.) On January 5, 1925, the Collector advised the City Fiscal that pursuant to instructions from the Auditor, and after ten days, he would issue warrants for the fourth quarter of 1924 in favor of the Water District and against the City's apportionment of the internal revenue collections in the Insular Treasury. (R. 19-20.)

II.

THE PROCEEDINGS.

On January 8, 1925, the City instituted this proceeding in the Supreme Court of the Philippine Islands. (R. 3.) Its petition, amended on January 10, 1925, sets forth the facts substantially as stated above herein, but alleges that the Water District is neither a governmental entity, nor office, nor branch of the Insular Government; that there exists no account between the Water District and the City the settlement of which the Auditor can legally authorize or enforce; that as fiduciary of the Carriedo funds and as owner of the Montalbon water system the City was and is entitled to the free use of water from said systems; that the City owed the Water District nothing by way of the alleged water service rendered by the Water District to the City; that the Water District was not the owner of the water system, but merely had the possession, administration, control and manage-

ment thereof; that one of the liabilities of the water system of the City assumed by the Water District was that of furnishing water free to the City for all its uses and needs; that even if the Auditor is empowered to settle the accounts outstanding between the City and the Water District, he is not authorized to settle an account which is disputed on the ground that it is not authorized by law; that in any event the issuance of warrants by the Collector for the allotments of internal revenue apportionment is a ministerial duty, the performance of which the Auditor is not authorized to prevent or control; but that unless prevented by the court the warrants will continue to be issued to the Water District, as set forth above, to the irreparable damage of the City; and prays for a preliminary injunction restraining the acts complained of during the pendency of this action; and upon the hearing of the case for a writ of mandamus ordering the Collector to issue thereafter all warrants for the City's apportionment of internal revenue collections to the City, and ordering the Auditor to countersign and approve such warrants so issued to the City, and for a permanent injunction restraining the Water District from claiming, charging or collecting from the City any amount for water service, theretofore or thereafter rendered. (R. 3-16.)

On January 8, 1925, the Supreme Court of the Philippine Islands issued an order of injunction, which on January 10, 1925, was superseded by a preliminary injunction restraining the Insular Treasurer from paying any warrant issued by the Auditor or the Collector in favor of the Water District "against the funds belonging to the petitioner (City of Manila) as its allotment of the internal revenue collections and of the special assessments provided for in Act No. 3065, during the pendency of this case." (R. 20-21.)

To the foregoing petition the respondents (petitioners here) demurred. (R. 21-22.) On September 22, 1925, the court, Justice Villa-Real taking no part having represented the respondents as Attorney General, and Justices Johnson and Ostrand dissenting, overruled the demurrer. (R. 23.)

Whereupon the respondents (petitioners here) on October 1, 1925, filed their answer in which they generally deny the above allegations of the petitioner, except as they are admitted in their special defense which alleges substantially that the Water District has been furnishing and rendering water service to the City since 1919, for which it has rendered bills to the City; that the City paid a part of the bills, but refused to pay others; that the Water District advised the Auditor of the refusal by the City to pay such bills, requesting him to enforce the adjustment and settlement of said outstanding accounts; that the Auditor, after due study of the claims of the Water District against the City, taking into consideration the conflicting contentions of both parties, reached the conclusion that said claims were just, legal and proper, made demand upon the City for payment and settlement of same, and advised the City that if it failed so to do he would exercise the power vested in him by Section 588 of the Administrative Code, as amended, *supra;* that the City refused to comply with said demand, whereupon the Auditor instructed the Collector that thereafter and until further notice, all warrants covering the internal revenue collections allotted to the City be drawn in favor of the Water District; that the Collector advised the City that within the specified time he would issue the warrants as directed by the Auditor; that the Collector was prevented from so doing by the preliminary injunction in this case; and pray for dismissal of the City's petition. (R. 24-27.)

The City demurred to the special defense of above answer. (R. 44-51.) On November 25, 1925, the court, Justices Johnson and Villa-Real taking no part (R. 77), Justice Street concurring in the result, and Justice Ostrand dissenting (R. 78-87), sustained the demurrer, and gave the respondents ten days to amend their answer or the prayer of the petition would be granted in part. (R. 51-77.) The respondents informed the court they were unable to amend their answer, prayed that the decision be considered final,

excepted thereto and moved for a reconsideration thereof. (R. 88.) Reconsideration was denied, Justices Johnson and Villa-Real taking no part, and Justice Ostrand dissenting. (R. 89.) On December 21, 1925, the court rendered judgment directing that the preliminary injunction be made permanent; that a writ of mandamus issue "ordering the respondent, Collector of Internal Revenue to issue in favor of the petitioner (City of Manila), and not to the Metropolitan Water District, all the warrants which he ought to issue for the share of the petitioner in the internal revenue collections and in whatever other fiscal collections to which said petitioner is, by law, entitled;" that a writ of mandamus issue "ordering the respondent Ben F. Wright, Insular Auditor, his deputies, agents, employees or other persons acting in his stead, to countersign and approve any check, warrant, or order of payment which the respondent Collector of Internal Revenue may issue in favor of the petitioner (City of Manila) for such sum of money as represents its share of allotment in the internal revenue collections and in the special tax imposed by Act No. 3065." (R. 90-91.)

The grounds for the decision as stated by the court are briefly as follows:

(1) That the money against which such warrants were to be drawn is the allotment of the City from the "internal revenues collected under the laws of the Philippine Islands" (Section 490, Administrative Code, 1917); that it is public money assessed, levied and collected for a specific purpose and should "be treated as a special fund in the treasury and paid out for such purposes only" (Section 3, Act of August 29, 1916, 39 Stat. 554, hereinafter referred to as Organic Act), and was held in the treasury of the government in trust for the sole use and benefit of the City; that the City is entitled to receive the money quarterly "upon warrants drawn by the Collector of Internal Revenue." (Section 497, Administrative Code, 1917.) (R. 64.)

(2) That neither the Auditor nor any other person has

any authority to take money out of the treasury of the Government for any purpose, "except in pursuance of an appropriation by law," and no appropriation was ever made by the government or by the City to pay the claim of the Water District against the City. (R. 65-72.)

(3) That the Water District is a public corporation, and even if the Auditor has any authority to enforce settlement between governmental entities, he has no power to compel a municipal corporation to pay a claim to a public corporation where the former disputes the claim. (R. 69-73.)

(4) That the account involved between the City and the Water District is not one of accounting but is one of legal liability (R. 69).

(5) That the Auditor is not vested with judicial powers (R. 70).

(6) That if the Auditor is vested with judicial power his actions in this case involve the taking of property without due process of law. (R. 72.)

(7) That the decisions of the Auditor are final and conclusive only upon the "executive branches of the Government," and do not bind the courts. (R. 73.)

(8) That the City is not included within the term "executive branches of the Government," in so far as the powers of the Auditor are concerned. (R. 73-74.)

(9) That the City is legally entitled to the possession of the funds in question, and the decision of the Auditor to divert the funds to the Water District is null and void. (R. 76.)

III.

THE QUESTIONS PRESENTED.

(1) The extent of the powers of the Auditor to authorize and enforce settlement of accounts subsisting between the governmental branches of the Philippine Islands, and whether such powers are discretionary and quasi judicial.

(2) The extent of the powers of the Supreme Court of the Philippine Islands to interfere with or control the Auditor in the exercise of the above powers.

(3) Whether the method of enforcement of the settlement of the accounts subsisting between the City and the Water District used by the Auditor was the taking of the property of the City without due process of law.

(4) Whether the remedy of the City is not limited to an appeal to the Governor General and the Secretary of War pursuant to Section 25 of the Organic Act, or to the Philippine Legislature.

(5) The meaning of the term "accounts" as used in the Accounting Law and in Section 24 of the Organic Act.

(6) The meaning of the provision of section 24 of the Organic Act that the Auditor "shall examine, audit, and settle all accounts pertaining to the revenues and receipts from whatever source of the Philippine Government, and of the provincial and municipal governments of the Philippines, * * *; and audit * * * all expenditures of funds or property pertaining to * * * the government or the provinces or municipalities thereof," when considered together with the provisions of Section 588 of the Administrative Code, as amended, empowering the Auditor "to authorize and enforce the settlement of accounts subsisting * * * between provincial governments; between municipal or city governments; and between any such provincial and municipal or city governments."

(7) Whether the finality and conclusiveness of the Auditor's decisions upon the executive branches of the Government under the law apply to the provinces, municipalities and cities of the Philippines, in view of the fact that certain legislative functions are delegated to the boards or councils of such entities.

(8) Whether the plenary power of the Philippine legislature over the finances and revenues of the City can not be exercised by and through an official, expressly so authorized by said legislature.

(9) Whether the City can maintain this action at all, the same being instituted by one government branch against other branches and officers of the same government, which is a government with a centralized administration.

IV

THE REASONS FOR GRANTING THE WRIT.

1. The general importance to the relation of the United States with the Government for the Philippine Islands of the following questions:

(a) Whether the Supreme Court of the Philippine Islands has jurisdiction to require the Auditor, appointed by and holding office at the pleasure of the President of the United States, to approve the decisions of, and countersign the warrants, checks or orders drawn by the Collector.

(b) The extent of the powers of the Auditor over the settlement of accounts subsisting between the various governmental branches enumerated in Section 588 of the Administrative Code, 1917, as amended by Act No. 3066, and whether such powers are controllable by mandamus.

(c) Whether the provinces, municipalities and cities of the Philippine Islands are to be considered as parts of the executive branches of the Government in so far as the finality and conclusiveness of the Auditor's decisions upon the executive branches of the Government are concerned.

(d) Whether the decisions and acts of the Auditor in the enforcement of "the settlement of accounts subsisting" between the various bureaus, offices, and provincial, municipal and city governments, and particularly "between provincial governments" are controllable by the Supreme Court of the Philippine Islands by mandamus.

(e) Whether by reason of the fact that certain legislative powers have been delegated to the various provincial, municipal and city governments of the Philippines, the decisions of the Auditor in the settlement of accounts subsisting between such branches, are stripped of the finality and conclusiveness with which they are clothed by the Organic Act, in spite of Section 17 of the Administrative Code, 1917, which provides:

"The executive authority is vested in the following agencies; * * * the provincial and local governments * * * in the exercise of the administrative powers conferred on them. The legislative power is vested in the Philippine legislature."

2. The general importance to the administration of the Insular Government under the Organic Act and laws of the Philippine Legislature of a conclusive determination of the following matters:

(a) The meaning as used in said laws of the terms "accounts," "settlement of accounts" and "executive branches of the Government."

(b) The status of the provincial, municipal and city governments, and particularly of the City and the Water District in the administration of the Accounting Law.

(c) The means which the Auditor may use in enforcing settlements of accounts subsisting between the governmental branches.

3. The failure of the court below to comprehend the effect of the methods of enforcement of settlements used by the Auditor in this case; and the disregard by the court of the fact that such methods are in accord with the practice which has been followed without question by the accounting officers of the United States for a century.

4. The disregard of the applicable decisions of the Supreme Court of the United States in *United States v. Railroad Company* (84 U. S. 322, 329), *New Orleans v. Clerk* (95 U. S. 654), and *United States v. Realty Company* (163 U. S. 443), that a municipal corporation is a creature of the State (Philippine Government), which the State at pleasure may govern and control through its legislature or channels chosen by the legislature.

5. The disregard of the applicable decision of the Supreme Court of the United States in *Barnes v. District of Columbia* (91 U. S. 540, 543), that in so far as the character of the powers of officers of a city are concerned it makes no

difference whether they are appointed by the executive of the state or government, chosen by the Congress or legislature, or elected by the people of the municipality.

6. The disregard of the fundamental principle of law that not all of the acts of a city council or municipal board are legislative, but many of their acts are executive and their acts in passing upon claims against the city or municipality belong to the latter class.

7. The disregard of the applicable decisions of the Supreme Court of the United States in *Gaines v. Thompson* (7 Wall. 347), *Lee v. Johnson* (116 U. S. 48), and *Orchard v. Alexander* (157 U. S. 372), that because duties of executive officers in the administration of the law require in their performance the examination and consideration of evidence and the exercise of judgment thereon, they are none the less executive duties.

8. The disregard of the applicable decision in *Murray's Lessee et al v. Hoboken Land and Improvement Company* (59 U. S. 272), (a) that administrative duties, such as the auditing of accounts, may involve on the part of an executive officer the exercise of judgment upon both law and fact, may be, in the enlarged sense, judicial acts, but that is not sufficient to bring such matters under the judicial powers; (b) that "due process of law" does not necessarily require "actor, reus, judex, regular allegations, opportunity to answer, and trial according to some settled course of judicial proceeding."

9. The disregard of the applicable decisions of the Supreme Court of the United States in *Dunlap v. Black* (128 U. S. 40), and *Redfield v. Window* (137 U. S. 636), that mandamus will lie to compel the performance only of duties the performance of which the law requires without further question, but the courts will not interfere by mandamus with the executive officers of the government in the exercise of their ordinary official duties, even where those duties require an interpretation of the law.

10. The disregard of the applicable decision of the Su-

preme Court of the United States in *Metropolitan Railroad v. District of Columbia* (132 U. S. 1, 8), that through motives of expediency including the necessity of high executive ability in dealing with particular populations, the administration of the affairs of a municipal corporation, or some portion thereof, is not infrequently given over to officials appointed by the legislature or executive of a state.

11. The disregard of the applicable decisions of the Supreme Court of the United States in *Brashear v. Mason* (6 Howard 92), and *Decatur v. Paulding* (17 Howard 294), that where consent has not been given to sue the Government, moneys to the credit of general appropriations in the Treasury may not be controlled by extraordinary judicial process directed against officers of the Government, the situation with respect to suits against the Government for the Philippine Islands being the same as that existing prior to the creation of the Court of Claims in 1855 for suits against the United States.

12. The disregard of the applicable decision of the Supreme Court of the United States in *United States v. Lynch* (137 U. S. 280), that even after the Government had consented to be sued, the auditors and comptrollers of the United States Treasury may not be controlled by extraordinary judicial process in the settlement of claims and countersignature of warrants chargeable to general appropriations in the United States Treasury, Section 24 of the Organic Act providing that the Auditor for the Philippine Islands, except as to appeal to the Governor General and Secretary of War, shall have "like authority as that conferred by law upon the several auditors of the United States and the Comptroller of the United States Treasury." The exception referred to is not a limitation of the authority of the auditor for he, in fact and in law, has greater powers than the former auditors and comptrollers of the United States Treasury.

13. The disregard of the applicable decision of the Supreme Court of the United States in *Work v. United States,*

ex rel Rives (267 U. S. 175), that extraordinary judicial process cannot be invoked to operate as a writ of error to review the discretionary acts of public officers.

14. The absence of a justifiable controversy.

15. The disregard of the applicable decisions of the Supreme Court of the United States in *Ekiu v. United States* (142 U. S. 161), and *Baltimore and Ohio Railroad v. Pitcairn Coal Co.* (215 U. S. 481), that there can be no resort to extraordinary judicial process even in an otherwise proper case until exhaustion of administrative remedies.

Wherefore, it is respectfully submitted that the writ of certiorari should issue as prayed.

L. H. Hedrick,
O. R. McGuire,
Attorneys for Petitioners.

The United States of America, District of Columbia, ss:

L. H. Hedrick, being duly sworn, says that he is one of the attorneys for the petitioners herein and that he has carefully read and examined the foregoing petition, that the facts therein stated are true to the best of his knowledge, information and belief, and, in his opinion, the said petition is well founded and the case is one in which the prayer of the petitioners should be granted by this Court.

L. H. Hedrick.

Subscribed and sworn to before me this 3rd day of May, 1926.

N. Curtis Lammond,
Notary Public.

My Commission expires July 16, 1929.

BRIEF IN SUPPORT OF THE PETITION.

BRIEF IN SUPPORT OF THE PETITION.

The proceedings, opinions and judgment of the Supreme Court of the Philippine Islands entered December 21, 1925, have not yet been reported. They are, however, set forth in the printed transcript of record filed in this case. (R. 3-92.)

JURISDICTION.

The petitioners apply to this Court for a writ of certiorari to review the judgment of the Supreme Court of the Philippine Islands pursuant to authority granted by Sections 7 and 8 of the Act of February 13, 1925 (43 Stat. 940).

ARGUMENT.

I.

The Auditor for the Philippine Islands is Empowered to Enforce the Settlement of Accounts Subsisting Between the City of Manila and the Metropolitan Water District, and His Decisions in Such Matters Are Final and Conclusive Upon Both the City and the Water District.

Because certain legislative powers have been delegated to the Municipal Board of the City, it does not follow that all of the acts of the Board are legislative, for many of its acts are administrative or executive.

Gallagher v. Olyphant (Pa.), 37 Atl. 258.
Jones v. Power Co. (Pa.), 51 Atl. 762.
Shelby v. City of Burlington (Ia.), 101 N. W. 101.

Its legislative powers must be exercised by ordinance, but not so its executive powers.

Atchison Board of Education v. DeKay, 148 U. S. 591, 598.
Creighton v. Manson, 27 Cal. 614, 629.
Central City v. Sears, 2 Colo. 588.
London Mills v. White, 208 Ill. 289, 297.
Kepner v. Commonwealth, 40 Pa. St. 124.

In the latter class (executive) is included the transaction of current business, the ordinary administration of municipal affairs (Jones v. Schuylkill Light, H. & P. Co. 202 Pa. 164), in which in turn is included the auditing, allowing and paying of debts incurred in the daily conduct of the City's business. Commonwealth v. Diamond Nat'l Bank, 9 Pa. Super. Ct. 118.

In so far as the administration of Chapter 26, Administrative Code, 1917, as amended by Act No. 3066 (designated by the Philippine Legislature as the Accounting Law) is concerned, both the City and the Water District are provinces, and parts of the executive branches of the Government. Section 593 of said chapter provides inter alia:

> "The provinces of the Philippine Islands, the chartered cities and the Metropolitan Water District, which shall be regarded as provinces, are hereby divided into twenty-two regular and one special auditing districts, and the Insular Auditor is hereby authorized to appoint a district auditor to each * * *. Said districts are hereby numbered, constituted, and established as follows:
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> * * * * * * * * *
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> Seventh: City of Manila and Metropolitan Water District."

The Auditor is empowered, generally by Section 24 of the Organic Act and specifically by Section 588 of the Administrative Code, 1917, as amended by Act No. 3066, to enforce the settlement of accounts subsisting between the City and the Water District as such provinces, and the statute provides that his decisions shall be final and conclusive upon them as upon all other executive branches of the government or parts thereof, except for the appeal to the Governor General and Secretary of War as provided by Section 25 of the Organic Act.

The City, while a political body corporate acting under a special charter (Chapter 60, Administrative Code, 1917),

and possessed of many of the powers which pertain to a municipal corporation, nevertheless is part and parcel of and a branch of the Government of the Philippine Islands. Under its charter, *supra*, its mayor is appointed by the Governor General with the consent of the Philippine Senate, and is subject to the authority and supervision of the Secretary of the Interior (Section 2434). Temporary vacancies on the Municipal Board, although the members thereof are elective, may be filled by the Governor General (Section 2439). Election ties are broken by the Governor General, and vacancies caused by ineligibility of any person elected, or by failure of election are filled by the Governor General with the consent of the Philippine Senate (Section 2440). The Secretary of the Interior has certain supervision over meetings of the Municipal Board (Section 2443). In the event of second veto of an ordinance, resolution or motion by the mayer, the Governor General has final power of approval or disapproval (Section 2443). The city fiscal and his assistants, the judge and clerk of the municipal court, the justice and auxiliary justice of the peace, the city engineer and his assistants, the chief of police and his assistant, the chief of the fire department, the city treasurer, the city assessor, and the city superintendent of schools are appointed by the Governor General with the consent of the Philippine Senate (Act No. 2991). The Insular Auditor, Insular Treasurer, Director of Education, Director of Health and Director of Prisons are ex officio officers of the City. (Article V, Chapter 60, Administrative Code, 1917). The moneys of the City must be deposited daily in the Insular Treasury or a Government depositary (Act No. 3000).

The Water District, while a "public corporation," is, as stated in the dissenting opinion in this case, more than an ordinary public corporation, being in this respect similar to the United States Shipping Board Emergency Fleet Corporation. The Water District is an agency of the Government, a Governmental entity created for a governmental

purpose is in fact a part of the executive branch of the Government, and is under the control, direction, and general supervision of the head of one of the executive branches of the Government, the Secretary of the Interior. (Section 1, Act No. 2832.) Its powers are exercised and its business managed by a board of whom all save one (President of Municipal Board of the City) are appointees of the Governor General (Section 3, Act No. 2832, as amended by Act No. 3109), and even that one may be the Governor General's appointee (Section 2440, Administrative Code, 1917). The Governor General has appellate jurisdiction over the decisions and resolutions of the Board. (Act No. 3109.) The Water District's Manager and Assistant Manager are appointed by the Governor General, by and with the consent of the Senate, and may be removed by him (Section 6, Act No. 2832).

Section 24 of the Organic Act pertinently provides:

> "That there shall be appointed by the President an Auditor, who shall examine, audit and settle all accounts pertaining to the revenues and receipts from whatever source of the Philippine Government and of the provincial and municipal governments of the Philippines, * * * and audit, in accordance with law and administrative regulations, all expenditures of funds or property pertaining to or held in trust by the Government or the Provinces or municipalities thereof. He shall perform a like duty with respect to all government branches.
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> * * * * * * * * * *
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> The administrative jurisdiction of the auditor over accounts, whether of funds or property * * * shall be exclusive.
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> * * * * * * * * * *
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> The decisions of the auditor shall be final and conclusive upon the executive branches of the Government, except that appeal therefrom may be taken * * *. (To the Governor General and Secretary of War, Section 25.) In the execution of their duties the auditor

and the deputy auditor are authorized to summon witnesses, administer oaths, and to take evidence, and, in pursuance of these provisions, may issue subpoenas and enforce the attendance of witnesses, as now provided by law. The office of the auditor shall be under the general supervision of the Governor General * * *."

Section 588, Administrative Code, 1917, as amended by Act No. 3066, provides in pertinent part:

> "The Insular auditor shall have the power * * * to authorize and enforce the settlement of accounts subsisting between the different bureaus or offices of the Insular service; between any such bureau or office and any provincial, municipal, or city government; between provincial governments; between municipal or city governments; and between any such provincial and municipal or city governments."

II.

The Claim of the Metropolitan Water District Against the City of Manila Constitutes an Account as That Term is Used in the Pertinent Laws.

There can be no doubt that the Congress intended to use the term "accounts" in Section 24 of the Organic Act, *supra*, in the same sense as it is used in Section 236, Revised Statutes, as amended by the Act of July 31, 1894 (28 Stat. 205, 211) relating to the accounting officers of the United States, with respect to whose duties and powers the duties and powers of the Auditor are assimilated. So too must the Philippine Legislature have had in mind the same meaning when using the term in dealing with the same subject-matter in the Accounting Law, *supra*.

An examination of the Act of July 31, 1894, *supra*, and Section 236, Revised Statutes, is sufficient to show that *claim* and *account* are used interchangeably. So too in the administration of these laws the settlement of an account and the settlement of a claim mean one and the same thing.

2 Ops. Atty. Gen. 518, 625.
1 First Comp. Dec. (2 Ed.) 512.

And this has been recognized by the Courts.

McKnight v. United States, 13 Ct. Cls. 292.
United States v. Harmon, 147 U. S. 268.

Mutuality is not necessary to constitute an account as the Supreme Court of the Philippine Islands has held in this case. There have been isolated cases that confine *account* to its derivative meaning, but common business practice as well as the great weight of judicial authority are to the contrary. The fact that the City had no claim against the Water District was immaterial. The claim of the Water District against the City constituted an account subsisting between the two entities the settlement of which the Auditor was empowered to authorize and enforce.

"An 'account' is a general term which covers any item of indebtedness, by contract, express or implied. 1 Cyc. 362; 1 Am. & Eng. Ency. Law, 434, and notes; 1 Words & Phrases, 87; Cave, Use of Wallace v. Burns, 6 Ala. 780; Morrisette, Extr. v. Wood, 128 Ala. 505, 507, 508, 30 South. 630."
Dees v. Self Bros. 51 So. 735, 736.

"While the primary idea of account—computatio—implies matters of debit and credit, the adjustment of which will show a balance to be accounted for by the one party or the other, 'it is not necessarily restricted to several distinct items nor is it the less an account that all the items of charge are by one person against another, instead of being a statement of mutual demands of debit and credit, provided the charges arise out of contract, express or implied, or some duty imposed by law.' 1 Enc. of L. and P. 362; Nelson v. Posey County, 105 Ind. 287, 4 N. E. 703."
McMullen Lumber Co. v. Strother, 136 Fed. 295, 302.

But even if items both of debit and credit were necessary to constitute an account the claim of the Water District in

this case would be an account since the City has paid part of the claim. (R. 28, 29.)

III.

The Method Used by the Auditor in Enforcing the Settlement in This Case Was Legal and Proper, and Well Within His Authority.

Section 491, Administrative Code, 1917, provides that of the internal revenue accruing to the Insular Treasury and not specifically applied elsewhere, "there shall be set apart ten per centum as a provincial allotment, * * * and twenty per centum as a municipal allotment." The section further pertinently provides that:

> "The City of Manila shall receive the shares which it would receive if it were both a municipality and a regularly organized province, and for the purposes hereof shall be deemed to be both the one and the other."

Act No. 3065 after imposing a sales tax provides that:

> "Ten per cent of the tax collected under this Act shall be distributed among the provinces and municipalities in accordance with the provisions of section four hundred and ninety-six of the Administrative Code, five per centum accruing to the provinces and the other five to the municipalities."

These were the funds with which the Auditor enforced this settlement and the requirement of Section 3 of the Organic Act, "That no money shall be paid out of the treasury except in pursuance of an appropriation by law," is thus met and satisfied.

Section 497, Administrative Code, provides that "The payment of the internal revenue allotments shall be made from the Insular Treasury quarterly, upon warrants drawn by the Collector of Internal Revenue," and Section 621 of said Code provides that:

> "No Insular warrant shall be paid by the Treasurer until countersigned by the Auditor or by an officer of the Bureau of Audits thereunto authorized in writing by him."

The Auditor refused to countersign a warrant transferring to the credit of the City of Manila its allotment of internal revenue taxes until it had settled the claim of the Metropolitan Water District against it for water service furnished the city and upon its continued refusal expressed his intention of countersigning a warrant transferring sufficient of such allotment to the Metropolitan Water District to liquidate the claim. The Auditor is not only authorized by the Accounting Law to enforce the settlement of accounts between the City and the Water District but by the Organic Act he has all of the jurisdiction and powers of the former auditors and Comptroller of the Treasury.

The auditors and comptrollers of the United States Treasury have long exercised the jurisdiction of transfer of funds from one appropriation to another within one department or independent establishment of the Government or between different departments or between different independent establishments of the Government. The attention of the Court is respectfully invited to 1 Lawrence, Comptroller of the Treasury, pages 419 to 431, for description and definition of the various kinds of warrants used in Treasury bookkeeping. See also 13 Comptroller's Decisions, 893, 901. Warrants are of four classes: appropriation warrants, repay and covering warrants, pay warrants, and surplus fund warrants. The warrant required in this case to debit the appropriation or allotment of internal revenue taxes in the Insular Treasury and to credit same either to the City of Manila or to the Water District is an appropriation warrant. Its purpose is to set apart from the general fund of internal revenue taxes the authorized allotment and to credit it on the proper ledger of the Insular Treasury to the proper account. It has long been the practice of the Auditors of the Treasury of the United

States to settle the claims of one department of the Government against the others and to state a settlement authorizing the drawing of an appropriation warrant against the appropriations of the department securing the services or supplies and crediting same to the applicable appropriations of the department furnishing same. See 9 Comptroller's Decisions, 625, *id.* 766; 17 *id.* 174; 1 Comptroller General's Decisions, 290; 2 *id.* 151, *id.* 325. The matter has long been covered by regulations. See Treasury Department Circulars No. 48, dated June 11, 1906, No. 54, dated August 14, 1907, No. 11, dated February 3, 1908, and No. 56, dated July 14, 1908. The Court will take judicial notice of these regulations. *Caha v. United States*, 152 U. S. 211.

This procedure was recognized and amplified by the Act of August 29, 1916 (39 Stat. 622), as to the Signal Corps of the Army and by Section 7 of the Act of May 21, 1920 (41 Stat. 607, 613), as to the remaining departments, etc., of the United States Government. Said section provides:

> "That whenever any Government bureau or department procures, by purchase or manufacture, stores or materials of any kind, or performs any service for another bureau or department, the funds of the bureau or department for which the stores or materials are to be procured or the service performed may be placed subject to the requisitions of the bureau or department making the procurement or performing the service for direct expenditure: *Provided*, That funds so placed with the procuring bureau shall remain available for a period of two years for the purposes for which the allocation was made unless sooner expended."

The amplification permits an appropriation warrant to be drawn and countersigned pursuant to section 11 of the Act of July 31, 1894 (28 Stat. 209), as amended by the Budget and Accounting Act of 1921 (42 Stat. 23, 27), by the Comptroller General debiting the available appropriations of the department furnishing the supplies and in advance of actual delivery, that is it permits doing prior to the delivery

of supplies or services what could always be done subsequent to such delivery.

Here the Water District had rendered the service to the City of Manila and the Auditor clearly had jurisdiction to audit and settle its claim against the City of Manila and to debit the appropriations of the City and credit same to the funds of the Water District in settlement of the account. The Auditor having such jurisdiction, the further question whether his decision on the account is correct is not before the Court in these proceedings. *Work v. United States Ex Rel Rives* (267 U. S. 175); *Riverside Oil Company v. Hitchcock* (190 U. S. 316). In the latter case the court said:

> "Whether he decided right or wrong is not the question. Having jurisdiction to decide at all, he had necessarily jurisdiction, and it was his duty to decide as he thought the law (and the facts) was, and the courts have no power whatever to review his determination by mandamus or injunction."

However, the Court below did not intimate that the decision was wrong.

IV.

No Act on the Part of the City of Manila Was Necessary to Satisfy the Provision of the Organic Act "That no Money Shall be Paid Out of the Treasury Except in Pursuance of an Appropriation by Law."

> "The origin of legislative appropriations is so well known that it seems almost a work of supererogation to here allude to it."
>
> State v. Moore, 69 N. W. 373.

> "An appropriation is *per se* nothing more than the legislative authorization prescribed by the Constitution that money may be paid out at the Treasury."
>
> Campagna v. United States, 26 Ct. Cls. 317.

The provision of Section 3 of the Organic Act, "that no money shall be paid out of the treasury except in pursuance of an appropriation by law", obviously refers to the general fund of Government money in the Treasury of the Philippine Islands over which the legislature has control and which can be appropriated only by the legislature. Any act of any board or body of the City purporting to authorize the payment of money out of the Insular Treasury, within the meaning of the above section, would be entirely futile. The Congress had in mind only the legislature, and the latter body is the only body empowered to enact an appropriation law authorizing the expenditure of money from the Insular Treasury as contemplated by the above section. This the legislature has done (See III above).

No other or further act of appropriation was needed to authorize the issue of an appropriation warrant to transfer the City's apportionment to the City's credit, or by the same means to apply the City's apportionment of such appropriated funds, or a part thereof, to the payment of an account subsisting between the City and the Water District, the enforcement of the settlement of which was committed by the Legislature to the Auditor in express terms and in accordance with the practice existing in the United States which was confirmed by Section 7 of the Act of May 21, 1920, *supra*.

V.

The Action of the Auditor in This Case Will Not Deprive the City of Manila of Its Property Without Due Process of Law.

The Court below in the majority opinion quote the true rule, but fail to give any effect to it, viz:

> " 'Due process of law,' in its constitutional meaning, includes administrative process of the customary sort, as well as judicial process. 3 Words and Phrases 2230." (R. 70.)

Even where a municipal corporation is not so closely connected with and is not part and parcel of the central government as is the City of Manila with relation to the government of the Philippine Islands, the power of the State over its affairs practically are plenary.

> "It is established by an overwhelming weight of authority, and, I believe, is conceded on all sides, that the Legislature has the constitutional power to direct and control the affairs and property of a municipal corporation for municipal purposes, provided it does not impair the obligation of a contract, and by appropriate legislation may so control its affairs as ultimately to compel it, out of the funds in its treasury, or by taxation to be imposed for that purpose, to pay a demand when properly established, which in good conscience it ought to pay, even though there be no legal liability to pay it." Linton v. Ashbury, 41 Cal. 525, 530.

And what the Legislature may do directly it may do through channels selected by it for that purpose.

> "A municipal corporation * * * is a representative not only of the State, but is a portion of its governmental power. It is one of its creatures, made for a specific purpose, to exercise within a limited sphere the powers of the State. The State may withdraw these local powers of government at pleasure, and may, through its legislature or appointed channels, govern the local territory as it governs the State at large."
> United States v. Railroad Company, 84 U. S. 322, 329.

In *Pawhuska v. Pawhuska Oil Company* (250 U. S. 394), the Supreme Court of the United States refers with approval to *New Orleans v. New Orleans Water Works* (142 U. S. 79) in the following words:

> "Some of the earlier cases were reviewed and it was said, p. 91, 'But further citations of authorities upon this point are unnecessary; they are full and conclusive to the point that the municipality, being a mere

agent of the State, stands in its governmental or public character in no contract relation with its sovereign, at whose pleasure its charter may be amended, changed or revoked, without the impairment of any constitutional obligation, while with respect to its private or proprietary rights and interests it may be entitled to the constitutional protection. In this case the city has no more right to claim an immunity for its contract with the Water Works Company, than it would have had if such contract had been made directly with the State. The State, having authorized such contract, might revoke or modify it at its pleasure.' "

And again in *Stewart v. Kansas City* (239 U. S. 14, 16), the Supreme Court of the United States used the following pertinent language:

"It was said in Railroad Company v. County of Otoe, 16 Wall. 667, 676, that 'counties, cities, and towns exist only for the convenient administration of the government. Such organizations are instruments of the State, created to carry out its will.' This power of creation and control may be exercised in many ways and may give rise to actual or asserted inequalities. * * * It would be difficult to define restrictions upon this power of control and keep it efficient."

Kies v. Lowry, 199 U. S. 233.
Laramie County v. Albany County, *et al.*, 92 U. S. 307.
Worcester v. Worcester Street Railway Co., 196 U. S. 539.
Hunter v. Pittsburgh, 207 U. S. 161.

But even were the "due process of law" clause of the Organic Act applicable to the situation in this case there has been a full compliance with it.

"Due process of law is process due according to the law of the land."
Walker v. Sauvinet, 92 U. S. 90, 93.

See also:

Ballard v. Hunter, 204 U. S. 241.

The Auditor is the agency selected by the Legislature to enforce settlements of accounts subsisting between the City and the Water District. An account was so subsisting. The Water District requested the Auditor to enforce its settlement (R. 26). The Auditor "after due study" of the claim, "taking into consideration the conflicting contentions of both parties, reached the conclusion that said claim was just, legal and proper." (R. 26.) The Auditor then made demand on the City for payment and settlement of the claim, the City refused to comply (R. 27), and through the City Fiscal further presented its case (R. 18). That the City Fiscal chose to address himself to the Collector, instead of the Auditor, was his own concern. The fact remains the City's opportunity for hearing before the Auditor was ample, and a hearing was never denied the City. As said by Justice Bradley in *Davidson v. New Orleans* (96 U. S. 107), and quoted with approval in *Ballard v. Hunter, supra,* with regard to the process", "if found to be suitable or admissible in the special case, it will be adjudged to be 'due process of law.' "

VI.

There Was No Justiciable Controversy Before the Court.

The Government of the Philippine Islands has a centralized administration analagous to that of the United States, as contradistinguished from a decentralized administration such as exists in the various state governments of the United States. In the latter there is no administrative relation between the Governor and the heads of the departments, or between the heads of the different executive departments; each is separately elected by the people and owes his position to them. There is, however, a legal relation existing between these officials. Each has certain

rights, certain duties, and certain powers, and it may be that the exercise of some power by the Governor, for instance, may, when the act is done, set in motion the requirement of the performance of some duty by the head of a department, and this involves a legal relation with which the courts will deal.

See:
State v. Wrotnowski, 17 La. Ann. 156.
State v. Crawford, 28 Fla. 441.

In such a case only the courts can compel the performance of the required duty, for the independence of different departments of the administration one from the other prevents, in fact denies, any control by any one department of the administration over any other such department.

However, in a government with a centralized administration, such as that of the United States and of the Philippine Islands where the subordinates are appointed by a chief executive, the situation is quite different. It is not possible for the head of any department to stand out against the chief executive, and argue for his independence. Right or wrong, the head of a department must obey if it comes to a square issue. The relation existing between the two is not a legal relation with which alone the courts are concerned, but an administrative and political relation the enforcement of which lies exclusively within the powers of the chief executive. Few, if any, court decisions have considered the latter question, for the very good reason, as stated above, that the matter is not one for the courts. However, former Chief Justice Taney when Attorney General ably discussed the matter and advised President Jackson that should an officer of the executive branch of the Government refuse to obey the President's orders, the latter could remove the disobedient officer and substitute one who would carry out such orders. (2 Ops. Atty. Gen. 482.) The same question arose in the dispute between President Jackson and Secretary of the Treasury Duane, resulting in the dis-

missal of Mr. Duane and the appointment of Mr. Taney as his successor, who carried out the President's order with reference to government deposits. Similar questions arose between President Johnson and Secretary Staunton, and between President Wilson and Secretary Lansing. The legal relation which exists in decentralized administrations, however, is absent in a centralized administration, and the courts are not concerned with the administrative relation, for, otherwise, we would have the situation of the President suing the heads of the different executive departments when disputes arose, or one such department suing another, for example, the War Department suing the Navy Department. The statement of the proposition is its own refutation.

When it comes to money matters the Congress in the United States, and both the Congress and the Legislature so far as the Philippine Islands are concerned, take a hand by designating an official who shall have general control over such matters, the Comptroller General in the United States and the Auditor in the Philippine Islands. Chief Justice Taft says on page 81 of his book entitled *Our Chief Magistrate and His Powers:*

> "The Comptroller of the Treasury is an appointee of the President, and in a general sense is his subordinate. If the President does not like him as a Comptroller, he can remove him and with the consent of the Senate put in another one, but under the act of Congress creating the office, the President can not control or revise the decisions of this officer. His work is like the work I have referred to, quasi-judicial."

It is quite apparent that the relation existing between the President and the Comptroller General, at least prior to the Budget and Accounting of 1921 (42 Stat. 23, 27), and between the President and the Auditor, and also between the Comptroller General and the various executive departments, and between the Auditor and the various executive

departments in the Philippine Islands, is an administrative relation, one with which, as stated above, the courts are not concerned.

The Comptroller General settles money differences existing between branches of the executive departments, and enforces such settlements by adjustments in the applicable appropriations. That a department aggrieved at such a settlement and adjustment by the Comptroller General could apply to the courts to reverse or set aside his action is obviously so contrary to our scheme of government, and particularly to our accounting system, that no discussion would appear necessary to show that no such right exists. The fact that for more than a century the enforcement of any such right never has been attempted is sufficient proof of its non-existence.

The Legislature of the Philippine Islands, apparently comprehending this administrative relation and lack of legal relation between the executive branches of the Government, has made special provision for the settlement of disputes pertaining to appropriation or other money matters which arise between such branches. Specifically the Legislature has provided that for such purposes the City and the Water District shall be regarded as provinces (Section 593, Administrative Code, 1917, as amended by Act No. 3066, *supra*); and as specifically has provided that the Auditor shall authorize and enforce the settlement of accounts subsisting between provinces (Section 588, Administrative Code, 1917, as amended by Act No. 3066). These provisions coupled with the provision of the Organic Act that "the decisions of the Auditor shall be final and conclusive upon the executive branches of the Government," except for the appeal to the Governor General and Secretary of War (Section 24), forecloses any contention that these branches may present their money matter disputes to the courts for determination, even if that contention does not run counter, as we believe, to a fundamental proposition of the law of administration.

Furthermore, in the final analysis, it would be difficult to find a clearer case for the Auditor's action than the one before us. It is not disputed that the Water District furnished the water service to the City, nor is there dispute as to the reasonableness or uniformity of the charges therefor, indeed, there could not be. (R. 25.) This being true the obligation of the Water District to "charge and collect," and of the City to pay for such water service has been preadjudicated by the Legislature in Section 9 of Act No. 2832, which provides in pertinent part that:

> "The Metropolitan Water District * * * shall charge and collect a uniform rate for all services rendered, whether to any person, corporation, firm, governmental body, municipal entity, religious or charitable institution."

In such a situation, and considering the plenary control of the Legislature over municipal corporations, wherein can there be a justiciable controversy? Indeed, it is difficult to see wherein any controversy could be other than entirely one-sided. This was a case clearly demanding action by the Auditor, and the nature and manner of his action were as clearly indicated. He could not have refused to act, nor could he have done other than he did, without either failing to perform his duty or failing to perform such duty in the manner plainly indicated by the Legislature.

The court below by its decision and judgment denies the Legislature its plenary power of control over municipal corporations, denies the power of the Legislature to control the settlement of money disputes subsisting between the governmental branches, disregards the means provided by the Legislature for the settlement of such disputes, overturns a practice followed for more than a century in this country, disrupts the accounting system established for the Philippine Islands, and throws confusion into a centralized administration by attempting to apply the law of decentralized legal relations. Only by the assumption of

jurisdiction over a non-justiciable controversy could this have been accomplished, and we submit that in so doing the court committed grievous error.

VII.

The Jurisdiction Assumed by the Court Below in This Case Will Disrupt the Accounting System of the Philippine Islands.

As said by Justice Ostrand in his dissenting opinion:

> "If this court can by mandamus deprive the Chief executive of any of his constitutional prerogatives, the courts of first instance can do likewise. That this will not make for efficiency in administration, but will cause confusion and in cases such as the present tend to disrupt the Government accounting system can hardly be doubted. Congress in the exercise of its plenary powers over territorial governments has deemed the appeal to the Governor General an adequate mode of testing the validity of the decisions of the Insular Auditor and has made the remedy exclusive and its views should be respected by this court. (R. 84.)
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> * * * * * * * * *
>
> The court in assuming jurisdiction over the case has in effect undertaken to deprive the Chief Executive of jurisdiction expressly conferred upon him by constitutional statutes and has to that extent committed an encroachment upon the domain of a coordinate department of the Government and has arrogated to it powers not conferred on it by law." (R. 87.)

VIII.

To Grant a Writ of Mandamus Where the Law Provides a Plain, Speedy and Adequate Remedy is Contrary to the Decisions of This Court.

We submit that in determining the conflicting contentions of the City of Manila and the Water District and in enforcing a settlement between them, the Auditor was per-

forming semi-judicial duties involving judgment and discretion and that his acts and the acts of the Collector of Internal Revenue under his direction are not subject to review on a petition for writ of mandamus, *Work v. United States ex rel Rives* (267 U. S. 175), and that in any event the law afforded a plain, adequate, and speedy remedy preventing the granting of mandamus.

The Organic Act provides that:

> "Any person aggrieved by the action or decision of the auditor in the settlement of his account or claim may, within one year, take an appeal in writing to the Governor General, which appeal shall specifically set forth the particular action of the auditor to which exception is taken, with the reason and authority relied on for reversing such decision.
>
> If the Governor General shall confirm the action of the auditor, he shall so indorse the appeal and transmit it to the auditor, and the action shall thereupon be final and conclusive. Should the Governor General fail to sustain the action of the auditor he shall forthwith transmit his ground of disapproval to the Secretary of War, together with the appeal and the papers necessary to a proper understanding of the matter. The decision of the Secretary of War in such case shall be final and conclusive." (Section 25.))

This remedy is plain, speedy and adequate and where such a remedy exists there can be no resort to extraordinary judicial proceedings, *Bayard v. United States, ex rel White* (127 U. S. 246); *Poindexter v. Greenhow* (114 U. S. 270); *Bailey v. George* (259 U. S. 16); and particularly is this true where the law provides administrative appeals and such have not been taken, as here. *Ekiu v. United States* (142 U. S. 651); *United States v. Sing Tuck* (194 U. S. 161); *Baltimore & Ohio Railroad v. Pitcairn Coal Co.* (215 U. S. 481). If we substitute the Governor General and the Secretary of War as provided in Section 25 of the Organic Act, for the Interstate Commerce Commission, the following language of Chief Justice White in the *Pitcairn case* is controlling:

"We see no escape from the conclusion that the grievances complained of were primarily within the administrative competency of the Interstate Commerce Commission and not subject to be judicially enforced, at least until that body clothed by the statute with authority on the subject, had been afforded by a complaint made to it the opportunity to exert its administrative functions."

CONCLUSION.

For the foregoing reasons it is respectfully submitted that the petition for a writ of certiorari in this case should be granted.

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May 4, 1926.